LIBRARY
SUPREME COURT, U. S.

In The

Supreme Court of the United States

No. 71-

71-1086

JOHN A. MASIELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING ANOLIK
Attorney for Appellant
225 Broadway
New York, New York 10007
732-3050

(5053) LUTZ APPELLATE PRINTERS, INC.

INDEX TO BRIEF

	Page
Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
Argument:	
I. For the reasons set forth in the Statement of the Case, that is, that the case at bar was a "poisoned fruit" of an unlawful search and seizure conducted in a prior case involving petitioner, the judgment of conviction should be vacated and the indictment dismissed.	6
II. There is a strong indication that petitioner was "entrapped" and for that reason certiorari should be granted to determine whether his rights were thereby violated.	7
III. The conviction in the trial Court herein was in large measure based upon IRS "regulations" which were never published in the Federal	

Index

Page

Register. The petitioner was denied due process of law because the trial Court refused a charge that these unpublished regulations could not be the predicate for finding "intent" by petitioner to solicit Agent Ruggiero to violate his duty. 8

Conclusion 9

Table of Citations

CASES CITED:

Brown v. Allen, 344 U.S. 443, 451-2, 491-2 5

Butts v. United States, 273 Fed. 35 (CCA 8, 1921) 7

Cameron v. Johnson, 390 U.S. 611, 620, 88 S. Ct. at 1340 . . . . . 8, 9

Cox v. Louisiana, 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed.2d 487 (1965) 9

Edwards v. South Carolina, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed.2d 697 (1963). 9

Graham v. Lawrimore, 185 F. Supp. 761 (E.D. S.C. 1960), aff'd 287 F.2d 207 (4 Cir. 1961) 9

House v. Mayo, 324 U.S. 42, 48 5

Index

	Page
Mascia v. United States, ___ U.S. ___	7
Nardone v. United States, 308 U.S. 388	5, 6
Serrells v. United States, 287 U.S. 435	7
Sherman v. United States, 356 U.S. 369	7
Silverthorne Lubr. Co. v. United States, 251 U.S. 385	5
Sunal v. Large, 332 U.S. 174, 181	5
United States v. Carver, 260 U.S. 482, 490	5
United States v. Comi, 336 F.2d 856 (4 Cir. 1964), cert. denied 379 U.S. 992	7
United States v. Masiello, et al., 434 F.2d 33 (remanded); 445 F.2d 1324 (affirming)	2, 3, 4
Wright v. Georgia, 373 U.S. 284, 83 S. Ct. 1240, 10 L. Ed.2d 349	9

RULE AND STATUTE CITED:

F.R. Crim. P., Rule 52(b)	7
28 U.S.C. §1254(1)	2

Index

Page

UNITED STATES CONSTITUTION CITED:

Fourth Amendment 3

Fifth Amendment 3

Sixth Amendment 3

OTHER AUTHORITIES CITED:

73 Harv. L. Rev. 1333 (Entrapment) at 1340, 1341 (1960) 7

Uncommon Law, Sir A.P. Herbert, (1952) pp. 77-81, referring to Rex v. Commissioner of Metropolitan Police, etc. 8

APPENDIX

Order Denying Rehearing 1a

Order of Affirmance 3a

In The

Supreme Court of the United States

No. 71-

JOHN A. MASIELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

Petitioner, JOHN A. MASIELLO, respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the order of that Court which affirmed a judgment of the United States District Court for the Southern District of New York, convicting petitioner of bribery of a Revenue

Officer in connection with an audit which was being conducted of the petitioner's tax returns.

The Court of Appeals affirmed the judgment of conviction without opinion and, on the 26th of January, 1972, denied a petition for a rehearing, also without an opinion.

Petitioner was sentenced to two years imprisonment consecutive to five years imprisonment which he had received on a related earlier conviction in the case of United States v. John A. Masiello and John A. Masiello, Jr. This Court denied Certiorari in connection with that first case, in the last few weeks (434 F.2d 33, 445 F.2d 1324).

Opinion Below

The Second Circuit rendered no opinion in its affirmance of the judgment of conviction or in its denial of a rehearing.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals, Second Circuit, denied a motion for rehearing on the 26th of January, 1972 (see Appendix).

Questions Presented

1. Whether the conviction herein was a "poisoned fruit" of an unlawful search and seizure conducted in connection with a prior case in which certain records used directly and indirectly in the case at bar had been seized without a warrant?

2. Whether petitioner was entrapped by an IRS agent whose idea it originally was to attempt to bribe another agent?

3. Whether "regulations" of the Internal Revenue Service which were never published in the Federal Register should have been used in order to prove petitioner's intent to violate the law?

Constitutional and Statutory Provisions Involved

The Fourth, Fifth, and Sixth Amendments of the United States Constitution are involved herein.

Statement of the Case

It is petitioner's contention that the instant case is a "poisoned fruit" of the unlawful search and seizure perpetrated by the Government when it ransacked the business premises of Masiello which also housed the records of A.N.R. Leasing Co., Setmar Holding Corp. and so forth in connection with another case also involving bribery, United States of America v. Masiello et al., 434 F.2d 33, remanding the case, and 445 F.2d 1324, affirming. The Court below had originally granted

a stay of mandate in the previous case which petitioner maintains was predicated upon an unlawful search and seizure, although just recently, this Court denied certiorari therein. The previous case was reported sub nom., United States v. Masiello, 434 F.2d 33 (remanded); 445 F.2d 1324 (affirming).

The case at bar is intertwined with the aforesaid prior case which also alleged a bribery of a public official.

The facts of the first case, we submit, clearly lead to the inference that the audit in the case at bar was a direct outgrowth of the search and seizure, sans warrant, in the first case, wherein the Circuit Court declared originally on the remand:

> "If these characterizations of the facts are accurate, the activities of the federal officers could hardly be considered consistent with the requirements of the Fourth Amendment. ... ."

The case at bar had clear reference to Setmar Holding Corp., A.N.R. Leasing Co. (40a), etc. There were records of these, and other corporations operated by appellant whose records were seized in connection with the warrantless search in the first case, supra.

The first case herein, having been remanded for a hearing which produced substantial amounts of new testimony, was then affirmed without opportunity for oral hearing or to submit a brief.

This Court never passed upon the issue of the unlawful search and seizure in the first case since it denied certiorari. It is well known that the "denial of a Writ of Certiorari imports no expression of opinion upon the merits of the case as the bar has been told many times." (United States v. Carver, 260 U.S. 482, 490; Brown v. Allen, 344 U.S. 443, 451-2, 491-2; House v. Mayo, 324 U.S. 42, 48, and Sunal v. Large, 332 U.S. 174, 181.)

Since there was a significant amount of evidence referred to in the case at bar which we maintain could only have come from documents and records which were seized without a warrant in the first case, that there can be no doubt but that the case at bar is a "poisoned fruit" of the initial illegality (Nardone v. United States, 308 U.S. 388; Silverthorne Lubr. Co. v. United States, 251 U.S. 385).

A review of the record in the case at bar will disclose that the special IRS agent would not have entered the case but for the seizures of records of corporations in which petitioner had interests during the prior case.

Argument

I.

FOR THE REASONS SET FORTH IN THE STATEMENT OF THE CASE, THAT IS, THAT THE CASE AT BAR WAS A "POISONED FRUIT" OF AN UNLAWFUL SEARCH AND SEIZURE CONDUCTED IN A PRIOR CASE INVOLVING PETITIONER, THE JUDGMENT OF CONVICTION SHOULD BE VACATED AND THE INDICTMENT DISMISSED.

We do not believe that it is necessary to repeat the statement of the case since the interrelation of the seizure of evidence therein with the prosecution in the instant case is amply revealed. Records of corporations in which petitioner had an interest, such as A.N.R. Leasing Co., Setmar Holding Corp., were seized without a warrant.

The special agent clearly would not have had any basis for his investigation except for that seizure. This Court, by denying certiorari in the first case rendered no opinion as to the propriety of the search and seizure. The Court below, however, had previously indicated that the search and seizure was unlawful and it then denied oral argument to petitioner from the appeal of a suppression hearing (Nardone, supra) in that case. [See full discussion in "Statement of the case," supra.]

II.

THERE IS A STRONG INDICATION THAT PETITIONER WAS "ENTRAPPED" AND FOR THAT REASON CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER HIS RIGHTS WERE THEREBY VIOLATED.

While not specifically raised in the Court below, it is submitted that this Court, under Rule 52(b), F.R. Crim. P. should review the case as to the entrapment issue. In the recent case of Mascia v. United States, ___ U.S. ___, the Supreme Court denied certiorari with three justices dissenting and voting in favor of granting it. There are now two additional justices sitting (10 CrL 4114).

Justices Douglas, Marshall and Blackmum believed that certiorari should have been granted (10 CrL 4114, 4111).

In the case at bar, it is apparent that Agent Ruggiero offered Williams the opportunity of paying him a bribe and gratuity to get information about a tax fraud audit and investigation. There is no indication that the appellant had ordered Williams to initially approach Ruggiero or that he had a predisposition to pay a bribe. Thus the factual situation comes within the purview of entrapment. (Sherman v. United States, 356 U.S. 369; Serrells v. United States, 287 U.S. 435; United States v. Comi, 336 F.2d 856 (4 Cir. 1964), cert. denied 379 U.S. 992; Butts v. United States, 273 Fed. 35 [CCA 8, 1921]; 73 Harv. L. Rev. 1333 [Entrapment] at 1340, 1341 1960].)

Ruggiero was an "agent provocateur" as described in "Uncommon Law," Sir A.P. Herbert (1952, pp. 77-81) referring to Rex v. Commissioner of Metropolitan Police etc.

III.

THE CONVICTION IN THE TRIAL COURT HEREIN WAS IN LARGE MEASURE BASED UPON IRS "REGULATIONS" WHICH WERE NEVER PUBLISHED IN THE FEDERAL REGISTER. THE PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE THE TRIAL COURT REFUSED A CHARGE THAT THESE UNPUBLISHED REGULATIONS COULD NOT BE THE PREDICATE FOR FINDING "INTENT" BY PETITIONER TO SOLICIT AGENT RUGGIERO TO VIOLATE HIS DUTY.

The "regulations" of the IRS were apparently for internal use only, although the Court maintained that they had the force of "law." This holding undoubtedly violated petitioner's right to a fair trial.

Since the "regulations" were employed to galvanize the bribery and conspiracy statutes into effect, the statutes were applied in an unconstitutional manner, even though standing alone they may not be per se unconstitutional (Cameron v. Johnson, 390 U.S. 611).

In Cameron, the Supreme Court aptly explained:

> "We have not hesitated on direct review to strike down applications of constitutional

> statutes which we have found to be unconstitutionally applied to suppress protected freedoms. See Cox v. Louisiana, (379 U.S. 559, 85 S. Ct. 476, 13 L. Ed.2d 487 [1965]); Wright v. Georgia, 373 U.S. 284, 83 S. Ct. 1240, 10 L. Ed.2d 349; Edwards v. South Carolina, (372 U.S. 229, 83 S. Ct. 680, 9 L. Ed.2d 697 [1963])." Cameron v. Johnson, supra, 390 U.S. at 620, 88 S. Ct. at 1340.

We submit therefore, that the conviction was unconstitutional because it was based upon these clandestine and unpublished (in the Federal Register) "regulations." No taxpayer could be aware of them. Ignorance of the law may not be an excuse, but the nonexistence of a law or the utilization of an unavailable "regulation" would certainly be improper and unconstitutional.

> Graham v. Lawrimore, 185 F. Supp. 761 (E.D. S.C. 1960), aff'd 287 F.2d 207 (4 Cir. 1961).

Conclusion

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

s/ Irving Anolik
IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, New York 10007
RE2-3050

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

71-1985

- -x

United States of America,

Plaintiff-Appellee,

v.

John A. Masiello, William Williams,

Defendants,

John A. Masiello,

Defendant-Appellant.

- -x

A petition for a rehearing together with a motion to recall the mandate; to stay its reissuance; and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States, having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Order Denying Rehearing

s/ Henry J. Friendly
HENRY J. FRIENDLY, Chief Judge

s/ Leonard P. Moore
LEONARD P. MOORE, U.S.C.J.

s/ James L. Oakes
JAMES L. OAKES, U.S.C.J.

January 26, 1972

Order of Affirmance

UNITED STATES COURT OF APPEALS

For the

SECOND CIRCUIT

71-1985

At the Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of January, One Thousand Nine Hundred and Seventy-two.

Present:

BEFORE:

HON. HENRY J. FRIENDLY,
Chief Judge

HON. LEONARD P. MOORE
HON. JAMES L. OAKES,
Circuit Judges.

Order of Affirmance

- -x

United States of America,

Plaintiff-Appellee,

v.

John A. Masiello, William Williams,

Defendants,

John A. Masiello,

Defendant-Appellant.

- -x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk